UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DANIEL J. SULLIVAN, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	)	DOCKET NUMBER SF-0752-97-0320-I-1 DATE: JUL 1, 1998

David McKinnen, Reno, Nevada, for the appellant.

Frederick L. Hall, Esquire, Reno, Nevada, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant timely petitions for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons stated below, we GRANT the petition for review and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

Effective December 31, 1996, the appellant, a GS-10 Public Affairs Specialist, resigned from his position. Initial Appeal File (IAF), Tab 2, at 11-12.

The appellant's resignation was the result of an agreement entered into between him and the agency in settlement of certain equal employment opportunity (EEO) complaints. IAF, Tab 1, at 8-12. In his appeal, the appellant claimed that the agency manipulated the reduction-in-force (RIF) process and misrepresented backpay as vendor pay in order to coerce his resignation. IAF, Tab 2, at 1-6. He also claimed that he was discriminated against because of his disability. *Id*.

In his acknowledgment order, the administrative judge informed the appellant that resignation and retirement actions are presumed to be voluntary, and, therefore, not appealable to the Board. IAF, Tab 3, at 2-3. The administrative judge notified the appellant that he had the burden of proving that the Board had jurisdiction over his appeal and that his appeal would be dismissed unless he amended his petition to allege that his resignation was the result of duress, coercion, or misrepresentation by the agency. *Id*. at 3. The administrative judge also informed him that he would only be given a hearing if he made allegations of duress, coercion, or misrepresentation supported by facts which, if proven, would establish that his resignation was involuntary. *Id*.

In his response to the acknowledgment order, the appellant claimed, *inter alia*, that his resignation was the result of duress, coercion, and misrepresentation by the agency. IAF, Tab 4, at 1. Specifically, the appellant claimed that: he received a RIF notice that his position was being abolished; he was subjected to hostile behavior and adverse working conditions; he was being treated for work-related stress; and the agency representative assured him that he would have GS-11 status during his remaining tenure and for purposes of disability retirement in order to coerce his resignation. *Id*. The administrative judge dismissed the appellant's appeal without a hearing based on a finding that the Board had no authority to invalidate a settlement agreement that had not been incorporated into the record of a Board appeal of an action over which the Board had jurisdiction. IAF, Tab 15, at 2.

In his timely petition for review (PFR), the appellant claims that the settlement agreement was "an involuntary action resulting from agency coercion and fraudulent misrepresentation" and renews his request for a hearing. PFR File, Tabs 1, 4. The agency opposes the PFR. PFR File, Tab 3.

ANALYSIS

While the Board does not have the authority to enforce a settlement agreement not entered into the record for enforcement purposes, it has the authority to consider the validity of such an agreement, including one, as here, entered into proceedings not before the Board, so as to determine its effect on a personnel action before the Board. *See Wade v. Department of Veterans Affairs*, 61 M.S.P.R. 580, 582-83 (1994); *Laity v. Department of Veterans Affairs*, 61 M.S.P.R. 256, 261 (1994). Accordingly, the administrative judge's finding to the contrary is error. Thus, we grant the appellant's PFR to address his contentions that the settlement agreement and his ensuing resignation were involuntary.

An involuntary resignation is tantamount to a removal and is subject to the Board's jurisdiction. *See Short v. U.S. Postal Service*, 66 M.S.P.R. 214, 218 (1995). *Id*. Here, the appellant's December 31, 1996 resignation was a term of a November 12, 1996 pre-appeal EEO settlement agreement. IAF, Tab 1, at 8-12. The Board has the authority to consider the validity of a pre-appeal settlement agreement, by which the appellant agreed to resign, so as to determine its effect on a personnel action before the Board. *See Short*, 66 M.S.P.R. at 218. A hearing is required with respect to jurisdictional questions only if the employee makes a non-frivolous allegation that, if proved, would establish Board jurisdiction. *See Staats v. U.S. Postal Service*, 99 F.3d 1120, 1125 (Fed. Cir. 1996).

The appellant claimed that his resignation was the result of duress because of the agency's action during the 120-day period leading to his resignation. IAF, Tab 4, at 1. Specifically, he alleged that in July 1996 he received a RIF notice and was forced to accept a Clerk/Typing position that he was unqualified for

because of his visual impairment. *Id*. He further claimed that after working in the Clerk/Typist position for 6 weeks, he received a second RIF notice rescinding the previous job offer based on his physical inability to perform the job and informing him that he would be separated on November 13, 1996. *Id*. In addition, the appellant submitted documents showing that he was in fact issued two RIF notices. *Id*. at Subtabs 2, 13. It is well settled that the fact that an employee is confronted with the unpleasant choice of resigning or facing removal does not affect the voluntariness of the ultimate choice to resign. *See Schultz v. Department of the Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987). Absent a showing that the agency knew or believed that the termination could not be substantiated, or that an arguable basis for discharge did not exist, the fact that a decision to separate the appellant was issued does not render his subsequent resignation involuntary. *Id*. at 363. Here, while the appellant claimed that the agency was manipulating the RIF process to get rid of him, he did not present sufficient evidence supporting such assertions for the Board to conclude that a jurisdictional hearing is necessary. *See Briscoe v. Department of Veterans Affairs*, 55 F.3d 1571, 1573 (Fed. Cir. 1995) (although an appellant need not prove his entire case before he is entitled to a jurisdictional hearing, the Board may request sufficient evidence to determine if there is any support for what otherwise might be no more than bald allegations).

The appellant also claimed that his resignation was the result of duress in that he was suffering from work-related health problems and was given a 30-day medical leave. IAF, Tab 4, at 1. Where an appellant has alleged duress and emotional distress as a ground for involuntariness, the Board considers whether the appellant was represented below, whether he has demonstrated that he was mentally impaired at the time, and whether he has otherwise shown that he was unable to understand fully the nature of the action in question or to assist his representative in the appeal. *Wallace v. Department of Veterans Affairs*, 50

M.S.P.R. 676, 678 (1991). The appellant was represented by an attorney during the negotiating and the signing of the settlement agreement. IAF, Tab 1, at 12; Tab 5, Subtab 1, at 10. He submitted documentation that shows he was diagnosed with "fatigue, depression, back strain and neck strain related to having to use a monitor 8 hours a day despite severe visual loss, work related stress, headache, and genetic macular degeneration with the patient being legally blind." IAF, Tab 4, Subtab 5. The appellant, however, never alleged that he was unable to fully understand the nature of the settlement agreement or to assist his counsel. IAF, Tabs 1, 2, 4. Accordingly, he has not made a nonfrivolous allegation that the settlement and his resignation were involuntary because of his physical and mental conditions. *Cf. Short*, 66 M.S.P.R. at 219-220 (employee who submitted an affidavit from a licensed social worker stating, *inter alia*, that he was incapable of making a rational decision at the time of the signing of the agreement and claimed that the agreement was procured under time pressure made a nonfrivolous allegation).

The appellant also claimed that he was subjected to hostile behavior by agency management concerning his RIF and EEO concerns. IAF, Tab 4. To be entitled to a jurisdictional hearing on these issues, the appellant must make a nonfrivolous allegation that his working conditions were made so intolerable by the alleged reprisal and retaliation as to render his resignation involuntary by reason of coercion. *See Burke v. Department of the Treasury*, 53 M.S.P.R. 434, 438 (1992). The only specific incident that that the appellant claimed occurred was a meeting with the Director on July 11, 1996, wherein the Director allegedly chastised, threatened, and harassed him. IAF, Tab 4, Subtab 4. Even if such a meeting occurred, it alone would not be enough to show that working conditions were so difficult that a reasonable person in his position would have felt compelled to resign. *See Collins v. Defense Logistics Agency*, 55 M.S.P.R. 185, 190 (1992) (employee failed to make a nonfrivolous allegation that her resignation

was involuntary when she failed to allege sufficient specific facts which, if true, would show that she had no alternative to resignation), *modified on other grounds*, *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325 (1994). Moreover, the meeting occurred 4 months before the appellant signed the settlement agreement. IAF, Tab 4, Subtab 4.

In addition, the appellant claimed that the agency misled him about the benefits he would receive from the settlement agreement. The appellant claimed that "[t]he facility attorney, serving as proxy in this agreement, assured me that GS-11 status would apply to my remaining tenure and application for disability retirement." IAF, Tab 4, at 1. In order to show that his resignation was involuntary the appellant had to show not only that the agency representative's statement was misleading, but also that he reasonably relied on the statement to his detriment. *Malan v. Department of the Air Force*, 55 M.S.P.R. 283, 291 (1992). Pursuant to the November 12, 1996 settlement agreement, the agency agreed to pay the appellant a sum equal to the difference between his grade and pay (GS-10, Step 5) and the pay of a GS-11, Step 10 from August 31, 1993, until November 8, 1996, "**without a corresponding personnel action**." IAF, Tab 1, at 8 (emphasis in original). The agency also agreed to "[p]rovide a positive written employment reference mutually agreeable, based solely upon the performance as Public Affairs Specialist, GS-11/10, after the signing of this settlement agreement." *Id*. Thus, the settlement agreement does not require the agency to promote him to a GS-11, Step 10 position. *Id*. at 8-12. In light of the fact that the appellant was represented by counsel when he signed the agreement, we find that the appellant's assertions are not sufficient to constitute a nonfrivolous allegation that the agency's alleged misrepresentations both misled him and that he reasonably relied upon them at the time he executed the settlement agreement and submitted his resignation. We therefore conclude, upon evaluating all of the appellant's assertions under the totality of the circumstance test, that his assent to

the agreement and his resignation pursuant to it were voluntary. *See Heining v. General Services Administration*, 68 M.S.P.R. 513, 520 (1995), citing *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1575 (Fed. Cir. 1983).

For the reasons set forth above, we find that the appellant has not made a nonfrivolous allegation of involuntariness that would entitle him to a jurisdictional hearing on this issue. *See Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). Since the appellant voluntarily agreed to resign from his position, his appeal must be dismissed for lack of jurisdiction. Absent jurisdiction, we have no authority to adjudicate his claim of disability discrimination. *See Merriweather v. Department of Transportation*, 64 M.S.P.R. 365, 375 (1994), *aff'd*, 56 F.3d 83 (Fed. Cir. 1995) (Table).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.